

Entered on Docket

July 27, 2010

GLORIA L. FRANKLIN, CLERK
U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA



Signed: July 27, 2010


Leslie Tchaikovsky

LESLIE TCHAIKOVSKY
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT

NORTHERN DISTRICT OF CALIFORNIA

In re

No. 02-46284 T
Chapter 11

WESTERN ASBESTOS COMPANY,

Debtor.

MEMORANDUM OF DECISION RE MOTION TO APPROVE AND SETTLE WESTERN ASBESTOS SETTLEMENT TRUST'S SIXTH ANNUAL REPORT AND ACCOUNTING

The motion (the "Motion") to approve and settle the Sixth Annual Report and Accounting, Audited Financial Statements, and Claim Report (the "Sixth Annual Report and Accounting"), filed by the Trustees of the Western Asbestos Settlement Trust (the "Trust" and the "Trustees," respectively) came on for hearing on June 15, 2010. The Trustees appeared through counsel. No objections were filed with respect to the motion. However, Michael J. McDermott ("McDermott"), a Trust beneficiary, appeared at the hearing, pro se, and expressed dissatisfaction with the way the Trust was being operated. The Court directed McDermott to file and serve a written statement of his complaints (the "McDermott Statement") and gave the Trustees a

deadline for responding to it. The hearing was continued pending the Court's review of these filings.

THE McDERMOTT STATEMENT

McDermott's first complaint was that both the Trust and the attorneys (by which he apparently means both the Trust's attorneys and the beneficiaries' attorneys) had failed to explain adequately to them, in terms understandable by a lay person, how the Trust operates, its life span, and what they may expect to receive from it and when. McDermott noted that clear information on these issues may be important to the beneficiaries for tax and estate planning purposes.

McDermott's second complaint was that, although the beneficiaries apparently will not receive full payment of their claims, other people who are not beneficiaries appear to be making a lot of money administering and working for the Trust. McDermott suggested that these jobs could have gone to beneficiaries. He suggested that anyone administering or working for the Trust has an inherent conflict of interest in that they have an incentive not to terminate the Trust. He argued that this inherent conflict of interest demanded more transparency and full disclosure to beneficiaries with respect to the operation of the Trust.

McDermott's third complaint was that the costs shown on the Trust's balance sheets were not broken down in a manner that was useful for an unsophisticated beneficiary. He suggested that the children of the beneficiaries could be given jobs for the Trust before the money runs out.

1 McDermott's fourth complaint was that, although the legal fees
2 paid by the Trust run into many millions of dollars, there does not
3 appear to be any breakdown of what was paid for and at what rate.
4 He contended that the beneficiaries are paying for two sets of
5 attorneys: the attorneys who represented them initially and those
6 representing the Trust. Yet, the beneficiaries are not even told
7 what hourly rates are being charged for these legal services. He
8 complained that the beneficiaries' own attorneys are being paid 25%
9 of the distributions for doing nothing but redistributing the payouts
10 once every few years. He stated that he found it insulting and
11 called it "double dipping" that, in addition, the attorneys
12 representing the Trust are also being paid legal fees. He described
13 this as a long term windfall for law firms.

14 Finally, he asked the Court to investigate what could be done
15 to see that the beneficiaries of the Trust receive the maximum
16 benefit from the Trust, including employment where practicable. He
17 reiterated his desire for information about when the Trust would be
18 resolved so that beneficiaries who will not receive a full payout may
19 at least receive a tax benefit during their own lifetimes.

20 **THE TRUSTEES' RESPONSE**

21 Preliminarily, the Trustees noted that McDermott's complaints
22 do not appear to be an objection to the motion to approve and settle
23 the Sixth Annual Report and Accounting. Nevertheless, they undertook
24 to respond to McDermott's complaints and questions about the
25 operation of the Trust.

1 With respect to McDermott's first complaint, about the lack of
2 clear communication concerning the operation and anticipated life
3 span of the Trust, the Trustees attempted to provide the relevant
4 information so as to remedy this perceived lack. They explained the
5 purpose of the Trust and cited the law that governed its creation.
6 They explain that, because it is uncertain when all diseases caused
7 by exposure to asbestos will be discovered, the life span of the
8 Trust cannot be predicted with certainty. However, according to the
9 experts who testified in connection with the creation of the Trust,
10 the Trust is expected to continue for 40 to 50 years from its
11 inception.

12 The Trustees explained that the Trust will terminate ninety days
13 after all claims submitted have been paid or disallowed, there have
14 been twelve consecutive months during which no new asbestos claims
15 have been filed, and the Trustees determine that it is unlikely that
16 any new claims will be submitted. If all claims have been paid in
17 full and the expenses of the Trust have been paid, any money
18 remaining is required to be paid to a charitable organization which,
19 if practicable, is dedicated to research regarding or treatment of
20 asbestos related diseases.

21 The Trustees explained that the law governing the Trust requires
22 reasonable assurances that all claimants, including claimants whose
23 symptoms surface in the future, receive distributions equaling
24 substantially the same percentage of their claims. This percentage
25 has currently been estimated to be 44%. However, the percentage
26 payout may vary depending on the number and types of claims

1 submitted. In addition, there is still ongoing litigation from which
2 additional Trust proceeds may be recovered. At present they are
3 unable to predict the outcome of the litigation or how much the Trust
4 might receive if the litigation is successful.

5 The Trustees stated that the recent turmoil in the financial
6 markets has impacted somewhat the value of the Trust's assets.
7 However, it has not to date required them to adjust the estimated
8 percentage payout to a lower number. They noted that the estimated
9 payment percentage is subject to periodic review at the request of
10 the Trust Advisory Committee and/or Futures Representative. The most
11 recent review was conducted in 2010 and resulted in an increase in
12 the estimated percentage from 40% to 44%.

13 The Trustees noted that the Trust is not in a position to advise
14 or assist beneficiaries with tax or estate planning. Some claimants
15 have asked for information to be provided to the Internal Revenue
16 Service to assist them in connection with their tax issues and, when
17 possible, the Trustees have provided them with this information.

18 With respect to McDermott's second complaint, suggesting that
19 the beneficiaries or their children should be employed by the Trust,
20 the Trustees responded that this is not feasible. The Trustees noted
21 that the Trust has fiduciary obligations to both the present
22 beneficiaries and to future beneficiaries. There is a tension
23 between those holding present claims and those unknown individuals
24 who may discover in the future that they also have claims. Present
25 beneficiaries or their children would have a conflict of interest
26 with respect to the amount of trust assets that should be paid out

1 now as compared to being retained for the benefit of future
2 claimants. This would preclude them from working for the Trust in
3 a fiduciary capacity.

4 The Trustees responded to McDermott's suggestion that the
5 employees and professionals working for the Trust have a conflict of
6 interest themselves so that the Trust should have greater
7 transparency. They noted that the Trust provides information
8 concerning its operations, including its expenses, annually to the
9 Court and other interested parties. Its report is posted on the
10 Trust's website and can be compared to other similar reports filed
11 by other asbestos trusts. If McDermott has any specific concerns
12 about an entry in one these reports, he can raise them at any time.
13 The Trust employs accountants and auditors that monitor the
14 investment of trust funds, the payment of expenses, and the
15 administration of claims. The Trust endeavors to disclose the
16 results of financial statements in a meaningful way to beneficiaries
17 and will continue to attempt to improve this process for greater
18 transparency.

19 Finally, the Trustees took issue with McDermott's complaint that
20 the legal fees being paid by the Trust are too high and constitute
21 "double dipping" since their own attorneys are already receiving 25%
22 of the distributions for doing very little at this point. They noted
23 that the beneficiaries' attorneys represent the beneficiaries.
24 Different attorneys are required for the various constituencies of
25 the Trust, whose interests diverge: i.e., the Trust, the Trust
26 Advisory Committee, and the Futures Representative. Moreover, the

1 Trustees note that the beneficiaries may have entered into agreements
2 with their own attorneys permitting their attorneys to receive more
3 than 25% of their distributions. The Trust restricted the
4 beneficiaries' attorneys to retaining 25% of the distribution. The
5 Trustees recognized the high cost of operating the Trust and,
6 consistent with their fiduciary duty to claimants, asserted that they
7 at all times attempt to minimize those costs. Attached to the
8 response as Exhibit C is a list of the Trust Representatives and
9 Professionals with their current hourly rates.

10 **CONCLUSION**

11 The Court agrees with the Trustees that McDermott's complaints
12 are not, strictly speaking, an objection to the Sixth Annual Report
13 and Accounting. The Court also concludes that the Trustees'
14 responses to McDermott's complaints are appropriate and adequate.
15 The uncertainties involving the Trust and its operations and expenses
16 incurred in its operation are unavoidable given the nature of the
17 Trust and its various constituencies. The Trust is a complex
18 mechanism, which must deal carefully with large sums of money for the
19 benefit of numerous third parties with varying interests.
20 McDermott's complaint about "double dipping" and his suggestion that
21 the Trust should employ beneficiaries or their children are simply
22 misguided. The Court will approve the Sixth Annual Report and
23 Accounting and vacate the continued hearing on the motion. Counsel
24 for the Trustees is directed to submit a proposed form of order in
25 accordance with this decision.

26 END OF DOCUMENT

COURT SERVICE LIST

Michael J. McDermott
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ALL RECIPIENTS